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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

RONALD ALLISON et al., Plaintiffs and Appellants, v. HCP, INC., et al., Defendants and Respondents.	H036410 (Santa Clara County Super. Ct. No. CV145956)
RONALD ALLISON et al., Plaintiffs and Appellants, v. TENET HEALTHCARE CORPORATION et al., Defendants and Respondents.	H037045 (Santa Clara County Super. Ct. No. CV145956)

Appellants Ronald Allison and some of the other limited partners in a California limited partnership called Litho I appeal from judgments of dismissal after the superior court sustained without leave to amend demurrers to causes of action against four of seven defendants in appellants' action. One appeal concerns interference with contract and unjust enrichment/constructive trust causes of action against respondents HCP, Inc.

(HCP) and Health Care Property Partners (HCPP).[1] The other appeal concerns breach of fiduciary duty, unjust enrichment/constructive trust, and breach of contract causes of action against respondents Community Hospital of Los Gatos (CHLG) and Tenet Healthcare Corporation (THC). We conclude that the superior court did not err in sustaining the demurrers without leave to amend and entering judgments of dismissal in favor of these four defendants.

I. Standard of Review

" 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

"[W]e disregard allegations that are . . . contradicted by the express terms of an exhibit [such as a contract] incorporated into the complaint." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 178, fn. 3; *Peak v. Republic Truck Sales Corp.* (1924) 194 Cal. 782, 790; *Stoddard v. Treadwell* (1864) 26 Cal. 294, 303.) "Indeed, the contents of an incorporated document . . . will take precedence over and supercede any inconsistent or contrary allegations set out in the pleading. In the case of

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[1] HCP is apparently the general partner of HCPP.

such a conflict, we will look solely to the attached exhibit." (*Building Permit Consultants, Inc. v. Mazur* (2004) 122 Cal.App.4th 1400, 1409.)

II. General Background

Appellants were some of the limited partners in Litho I. Litho I was created in 1985 by National Medical Ventures (NMV) and appellant Manzone. NMV was the sole general partner of Litho I and held 60 percent of the ownership units in Litho I. Sixty-three physician limited partners held the remaining ownership units. Litho I had four or five non-physician employees. It possessed no tangible property. Litho I's only property consisted of bank accounts, accounts receivable, and "customer goodwill."

Litho I's business was providing lithotripsy services. Lithotripsy involves the use of a piece of equipment called a lithotripter to dissolve kidney stones. Litho I did not own the equipment for providing these services or the premises upon which they were provided. Instead, Litho I leased a lithotripter and other associated equipment from Tenet Healthsystems Hospitals, Inc. (THH) and used this equipment to provide lithotripsy services pursuant to a services agreement between THH, NMV, and Litho I. These services were provided in a portion of a hospital operated by CHLG that THH leased from HCPP. HCPP was the "master lessor" of the hospital's land and buildings, while THH was the "master lessee." THH assigned the master lease to CHLG in 2002. The services agreement provided that its term would be "concurrent with that of the Center Use Agreement." The Center Use Agreement (CUA) was an agreement between Litho I and THH that provided for Litho I's lease of the equipment and sublease of the portion of the hospital that it used to provide lithotripsy services. The CUA provided that the CUA would terminate upon the dissolution of Litho I. It also provided that "[t]his Agreement is subject and subordinate to all of the terms and provisions of the Master Lease and the rights of the lessor under the Master Lease."

In June 2008, CHLG notified HCPP that it would not be renewing the master lease. That same month, THH, THC, HCP, and HCPP resolved litigation amongst themselves by means of a settlement agreement. The settlement agreement acknowledged that the master lease on the hospital would not be renewed when it expired in May 2009. Thereafter, CHLG and HCPP amended the master lease to provide HCPP with an option to purchase CHLG's personal property on the hospital's premises, which included the equipment Litho I had leased from THH to provide lithotripsy services.[2] HCPP thereafter exercised this option.

On December 31, 2008, NMV caused Litho I to be dissolved over the objections of the physician limited partners. Nevertheless, lithotripsy services continued to be provided at the hospital using the same equipment and Litho I's former employees and telephone number. In April 2009, El Camino Hospitals purchased the hospital and the equipment from HCPP. It hired Litho I's former employees and thereafter provided lithotripsy services at that location using that equipment.

Appellants filed their original complaint against NMV, CHLG, THH, THC, and Litho I in 2009. After demurrers to some causes of action were sustained without leave to amend, appellants subsequently filed a first amended complaint adding HCP and HCPP as defendants. Demurrers to some of the causes of action in the first amended complaint were sustained without leave to amend, and appellants filed a second amended complaint. Demurrers were also sustained to some of the causes of action in the second amended complaint.[3] The court entered judgments of dismissal for THC, CHLG, HCP and HCPP, and appellants timely filed notices of appeal.

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[2] It is not entirely clear whether it was THH or CHLG that owned the equipment or whether it was transferred from one entity to the other at some point.

[3] After the rulings on the demurrers, the action remained pending as to defendants NMV, THH, and Litho I, who are not respondents in either appeal.

III. Liability of HCP and HCPP

The first appeal (H036410) concerns only the unjust enrichment/constructive trust and interference with contract causes of action against HCP and HCPP. The trial court sustained demurrers to these causes of action without leave to amend on the ground that they failed to state a cause of action.[4]

A. Unjust Enrichment/Constructive Trust

Appellants alleged that HCP and HCPP had been unjustly enriched, and a constructive trust should be imposed, because HCPP acquired the "goodwill" of Litho I and then sold it to El Camino Hospitals. Appellants alleged that, because HCP and HCPP knew that appellants owned 40 percent of Litho I, HCP and HCPP were obligated to pay to them their share of the amount HCP and HCPP allegedly received from El Camino Hospitals for Litho I's goodwill.

"The elements of an unjust enrichment claim are the 'receipt of a benefit and [the] unjust retention of the benefit at the expense of another.'" (*Peterson v. Cellco Partnership* (2008) 164 Cal.App.4th 1583, 1593.) The problem with appellants' allegations is that, even if all of their allegations are credited, they do not establish that HCP or HCPP *unjustly retained* any benefit belonging to appellants as a result of these transactions. Appellants alleged that NMV took Litho I's goodwill, that it was somehow transferred to THH or CHLG, from THH or CHLG to HCP or HCPP, and from HCP or HCPP to El Camino Hospitals. This chain of events does nothing to establish that HCP or HCPP, entities with no obligations to appellants, were the entities that retained a benefit belonging to Litho I as a result of these transactions. Instead, this reflects that any

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[4] HCP and HCPP have filed a motion to strike portions of appellants' appendix and opening brief on the grounds that they refer to matters outside the pleadings. Appellants contend that these references are necessary to explain the bases for their requests for leave to amend. We decline to strike these portions.

such benefit remained in the hands of NMV and THH, the entities with obligations to appellants, or ended up in the hands of El Camino Hospitals.

Other than reiterating that HCP and HCPP knew of Litho I's goodwill, appellants make no attempt to explain how HCP and HCPP acted *wrongfully*. Instead, appellants maintain that this cause of action was properly based on a theory of liability that they describe as follows: "When a third party participates in a fiduciary's breach of trust, that third party is liable to the cestuis. Restatement of Trusts 201; *Scott v. Symons* (1923) 191 Cal.441; *Lantz v. Stribling* (1955) 130 C.A.2d 476; Probate Code 15003. Participation requires knowledge of the breach and receipt of trust property." They do not discuss the authorities they cite at all or provide any further legal argument, but merely argue that their allegations established that *NMV* had a fiduciary duty to them.

Appellants' assertion lacks merit. The only fiduciary that they identify is NMV, and they do not allege that HCP or HCPP engaged in any transactions with *NMV*. The involvement of HCP and HCPP was limited to transactions with *THH* and *CHLG*. Hence, even if their theory were legally viable, it would not apply here. Moreover, none of the cited authorities supports appellants' claim that a "third party" is "liable" simply because it has "participate[d]" in a "fiduciary's breach of trust." Restatement of Trusts, section 201 states: "A breach of trust is a violation *by the trustee* of any duty which as trustee he owes to the beneficiary." (Italics added.) No mention is made of third parties. *Scott v. Symons* (1923) 191 Cal. 441 (*Scott*) involved a trustee who wrongly paid money belonging to Scott instead to Symons. Symons knew that he was not entitled to the money. Scott successfully sued Symons for the return of the money. The court held that Symons was an involuntary trustee of the money he had wrongfully come to possess and could be required to return it to Scott. (*Scott*, at pp. 453-456.) *Scott* is inapposite here. Appellants did not allege that HCPP or HCP wrongfully acquired anything from a trustee. If any entity was a trustee, it was NMV, and HCPP and HCP had no transactions with NMV. *Lantz v. Stribling* (1955) 130 Cal.App.2d 476 (*Lantz*) is similarly unhelpful.

Presumably appellants wish to rely on the statement in *Lantz* that "[o]ne who takes property from a trustee in violation of the trust with knowledge of the trust holds the property subject to the trust as a constructive trustee." (*Lantz*, at p. 481.) Appellants did not allege that HCPP or HCP took property from a trustee in violation of a trust. Probate Code section 15003 also concerns trusts, but appellants have failed to allege any basis for a finding that HCPP or HCP were trustees or dealt with a trustee.

Appellants also claim on appeal that their unjust enrichment/constructive trust cause of action, when read with other causes of action involving different defendants, should be construed as, or could be amended to allege, a cause of action against HCP and HCPP for conversion. However, conversion, like unjust enrichment, requires that the defendant *do something wrong*. (*Hernandez v. Lopez* (2009) 180 Cal.App.4th 932, 939.) Appellants have not alleged any such act by HCP or HCPP, and they do not purport that they could do so as they admit that any conversion was perpetrated by NMV, not HCPP or HCP, and that NMV did not engage in any transactions with HCP or HCPP. Under these circumstances, there is no possibility that appellants could amend their unjust enrichment/constructive trust cause of action to state a viable cause of action of any kind against HCP or HCPP. The trial court did not err in sustaining the demurrer to this cause of action without leave to amend.

B. Interference With Contract

The interference with contract cause of action alleged that HCP and HCPP were liable because they "persuaded and induced the Tenet affiliates" to breach the CUA knowing that Litho I was partially owned by persons other than "Tenet affiliates" and that "a Tenet affiliate had promised Litho I that Tenet would not give up its lease at [the hospital] or close [the hospital]." Appellants concede on appeal that this cause of action is based solely on the June 2008 settlement and the option that HCPP obtained to purchase the equipment. The exhibits establish that the *settlement* did not require that the lease not be renewed, but merely acknowledged that CHLG had decided not to renew the lease. HCPP did nothing more regarding the equipment than to obtain an option to purchase it and thereafter exercise that option. The settlement did not obligate CHLG to terminate the master lease nor did the option require HCPP to purchase the equipment.

" 'The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage.' " (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55.) "[I]t is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Ibid.*)

Appellants argue on appeal that HCP and HCPP were liable for interference with contract because HCP and HCPP "knew or should have known" that THH *would breach* the CUA if CHLG failed to renew the master lease and the equipment was sold.[5] While appellants' allegations satisfy the first two elements of the cause of action, the missing element was the third one. Appellants failed to allege that HCP and HCPP engaged in *intentional acts* that were *designed to induce* THH's breach. Even if the failure to renew the lease was sure to result in a breach of CUA, HCP and HCPP's acceptance of CHLG's exercise of its right not to renew could hardly constitute an intentional act of HCP and HCPP designed to induce THH's breach of the CUA. After all, HCP and HCPP lacked the power to force CHLG to renew the master lease. Although this cause of action *purported* to allege that HCP and HCPP *induced* THH to breach the CUA, the exhibits rebutted this allegation and demonstrated that HCPP merely *accepted* CHLG's failure to

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[5] Appellant's briefing on this issue is chiefly devoted to establishing that THH breached the CUA. We assume as much for the sake of this appeal.

renew the master lease and agreed to an option to purchase the equipment. Without contradicting the exhibits, appellants could not allege that HCPP's acceptance of CHLG's failure to renew and agreement to an option were intentional acts designed to *induce* THH's breach. Once CHLG decided not to renew the lease, the CUA could not be performed, and HCPP's purchase of the equipment could not induce the CUA's breach. In light of the exhibits, it is not reasonably possible that appellants could amend their allegations to state an interference with contract cause of action against HCP and HCPP. The trial court did not err in sustaining the demurrer to this cause of action without leave to amend.

IV. Liability of THC and CHLG

The second appeal concerns causes of action against THC and CHLG in all three iterations of the complaint. THC is a holding company that has no operations. CHLG is THC's wholly owned subsidiary. On appeal, appellants contend that they should be permitted to amend their second amended complaint to allege that CHLG was the alter ego of THC.[6]

A. "Participation in Breach of Fiduciary Duty"

The 11th and 13th causes of action in the original complaint alleged that THC and CHLG breached a fiduciary duty to appellants even though the complaint acknowledged that neither entity "itself owe[d] a fiduciary duty to" appellants. Appellants alleged that THC and CHLG were nevertheless liable for breach of fiduciary duty because they *knew*

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[6] Appellants, who have chosen to present this appeal based on an appellant's appendix, belatedly sought to augment the record in the appeal concerning THC and CHLG with tangential sealed documents. Because these documents are not relevant to our analysis, we deny the motion to augment.

that "*NMV* was breaching *its* fiduciary duty" to appellants and they "accepted" Litho I's "funds" and "goodwill." (Italics added.)

THC and CHLG demurred to the 11th and 13th causes of action on the ground that they owed no fiduciary duty to Litho I or appellants. Appellants contended that the demurrer should be overruled because THC and CHLG were liable as "third part[ies]" who had "participat[ed] in a fiduciary's breach of trust." The court sustained the demurrers without leave to amend on the ground that appellants had failed to allege that THC or CHLG had a fiduciary duty to them.

Appellants concede on appeal that THC "had no fiduciary relationship" with Litho I or its partners. Nevertheless, they claim that they could have amended their cause of action against THC to state a cause of action for "participation in breach of fiduciary duty against [THC]" because THC "directed" NMV to breach its fiduciary duty and to transfer Litho I's goodwill to CHLG for no value.

Similarly, although they conceded in their complaint that CHLG had no fiduciary duty to appellants or Litho I, on appeal they contend that CHLG was liable for "Participation in Breach of Fiduciary Duty" because CHLG had access to a THC bank account in which Litho I's funds were temporarily kept from 2004 to 2008, and because CHLG operated Litho I's former business for 100 days after Litho I was dissolved. Appellants concede that the funds in the bank account were handled in this manner with the consent of NMV, which was the general partner of Litho I and obviously had the authority to authorize such actions. NMV was also the entity that apparently gave CHLG authority to operate Litho I's former business during this period. Clearly NMV was a fiduciary to appellants whom appellants could seek to hold liable for breach of fiduciary duty in these respects. The question was whether CHLG could be held liable for breach of fiduciary duty notwithstanding its lack of any such duty.

As we noted earlier, appellants have provided no authority for their theory that any third party who "participates" in a fiduciary's breach of trust is liable for breach of fiduciary duty. Breach of fiduciary duty applies only where there is a fiduciary duty, which THC and CHLG indisputably lacked. Even if a third party *conspires* with a fiduciary for the fiduciary to breach its duty, the third party is not liable for breach of fiduciary duty or even conspiracy because a civil conspiracy cause of action is not an "independent tort;" it allows tort recovery only where the conspirator "is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510-511, 514.) Here, appellants claim that even in the absence of a conspiracy a non-fiduciary with no legal obligation to appellants is somehow liable for breach of fiduciary duty. As they are unable to muster any legal authority for their theory, we reject it. The trial court did not err in sustaining without leave to amend the demurrers to the breach of fiduciary duty causes of action against THC and CHLG.

B. Unjust Enrichment Regarding Bank Account

Two causes of action against THC and CHLG in the first amended complaint concerned a bank account. Between November 2004 and March 2008, Litho I did not have its own bank account. Instead, THC deposited Litho I's revenue into an account associated with CHLG, and Litho I's expenses and distributions were paid out of that account. In March 2008, THC conveyed all of Litho I's principal and interest from this account to Litho I.

Cause of action 10a alleged that THC had been unjustly enriched by its temporary possession of Litho I's funds in that bank account even though those funds had been returned to Litho I with interest. The 12th cause of action, based on the same factual allegations, alleged that CHLG had been unjustly enriched by the temporary presence of those funds in that bank account because CHLG had access to those funds. CHLG and THC demurred on the ground that these allegations failed to state causes of action. The trial court sustained these demurrers without leave to amend on the ground that they did not state causes of action.

These allegations do not state causes of action against THC or CHLG. As we noted earlier, one of the elements of an unjust enrichment claim, which is really a claim for restitution, is "'[the] *unjust retention* of the benefit at the expense of another.'" (*Peterson v. Cellco Partnership*, *supra*, 164 Cal.App.4th at p. 1593, italics added; *McBride v. Boughton* (2004) 123 Cal.App.4th 379, 387-388 [unjust enrichment is not really a cause of action but rather a basis for restitution].) Appellants' allegations do not describe how it was unjust for THC or CHLG to manage Litho I's account for four years and then remit all of Litho I's principal *and interest* in the account to Litho I. Appellants have not alleged that these funds were ever *withheld* from Litho I or that the management of this account by THC and CHLG was undertaken without Litho I's consent. Indeed, they concede on appeal that NMV, Litho I's general partner, which had authority to manage Litho I's affairs, consented to this arrangement. Their claim that they are entitled to "statutory interest" for this period, rather than the actual interest, is devoid of legal merit.[7] Since THC and CHLG never received "statutory interest," no basis for restitution of it can possibly be alleged. The trial court did not err in sustaining the demurrers to these causes of action without leave to amend.

C. Unjust Enrichment Regarding Goodwill

Cause of action 10b alleged that THC had been unjustly enriched by its alleged transfer to HCPP and HCP of Litho I's goodwill as part of the June 2008 settlement. Appellants sought a constructive trust on the value of Litho I's goodwill. On appeal,

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[7] Their reliance on partnership cases is inapt, as those cases clearly involved contractual and fiduciary obligations between the parties. Neither CHLG nor THC had any contractual or fiduciary obligations to appellants or Litho I.

appellants contend that THC and CHLG also were unjustly enriched because they profited from CHLG's provision of lithotripsy services during the 100 days between the dissolution of Litho I and El Camino Hospitals' undertaking of the provision of those services after it acquired the premises and equipment from HCPP. They suggest that THC's wrongful act was a conspiracy with NMV or THH. THC demurred to this cause of action, and the court sustained the demurrer on the ground that there were inadequate allegations that THC had been enriched or that any enrichment was unjust.

THC had no contractual obligations to appellants or Litho I that were breached as a result of the June 2008 settlement. THH was the entity that contracted with Litho I. CHLG was the entity that decided not to renew the master lease and to give HCPP an option to purchase the equipment. The fact that THC may have maintained THH's bank accounts did not create any underlying duties of THC to Litho I. Nor were there any allegations that THC, as opposed to THH, profited from THH's alleged breach of its obligations to Litho I and appellants. As THC had no underlying duty to appellants, appellants' conspiracy theory was not viable, as we have already explained. Nor have there been any allegations aimed at showing that it was unjust for CHLG to retain the profits from the services that it provided during the period after Litho I's dissolution and before the transfer to El Camino Hospitals. If anyone other than El Camino Hospitals retains Litho I's former goodwill or the value thereof, it could not be THC, as THC never had possession of this goodwill in the first place. The trial court did not err in sustaining without leave to amend the demurrer to this cause of action.

D. Breach of Contract

The 20th cause of action in the second amended complaint alleged that THH "and its successor in interest" had breached the CUA by deciding not to renew the master lease. This cause of action did not explicitly name CHLG as a defendant. Although the pleadings on the demurrer never suggested that this cause of action was against any defendant other than THH, on appeal appellants assert that the "successor in interest" was CHLG. THH and CHLG demurred to this cause of action on the ground that they had not terminated the master lease or closed the hospital so they were not in breach of the CUA, and, in any case, the CUA itself had terminated before the lease term ended because Litho I was dissolved in December 2008, but the master lease did not terminate until April 2009. The court sustained the demurrer without leave to amend.

Appellants' allegations in support of this cause of action fail in two respects. One, they claim a breach of the CUA, but CHLG was not a party to the CUA. While CHLG was assigned the master lease, appellants have not alleged that CHLG was assigned the CUA or by any other means became a party to the CUA. In fact, appellants concede that CHLG was not a party to the CUA and never was assigned the CUA in writing as the CUA required for assignments. Two, the CUA provided that it would terminate upon Litho I's dissolution. Since this dissolution occurred prior to the expiration of the master lease or the sale of the equipment, the CUA was no longer in force at the time of the alleged breaches of the CUA. While appellants maintain that the earlier decision by CHLG to not renew the master lease and the granting of an option to HCPP to purchase the equipment was an anticipatory breach, it has failed to allege a connection between those earlier decisions and Litho I's dissolution, which precluded an actual breach from occurring. The trial court did not err in sustaining the demurrer without leave to amend.

V. Disposition

The judgments are affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J.[*]

[*] Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.